Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and James L. Melillo and Lizza and Sons, Inc., Party in Interest. Case 29-CB-236

June 23, 1967

## **DECISION AND ORDER**

# By Chairman McCulloch and Members Brown and Jenkins

On March 29, 1967, Trial Examiner Morton D. Friedman issued his Decision in the above-entitled proceeding, finding that Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in the attached Trial Examiner's Decision. Thereafter the General Counsel and the Charging Party filed exceptions to the Trial Examiner's Decision and the General Counsel filed a supporting brief. The Respondent filed a brief in answer to the General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner only to the extent consistent with this Decision and Order.

We agree with the findings of fact made by the Trial Examiner, but disagree with his conclusions.

As found in the Trial Examiner's Decision, James Melillo began working for Lizza in 1950, and in 1951 became a driver and a member of the Union. He drove a truck until August 1960, when he reinjured his leg and was forced to give up driving. Lizza then employed him as a "runner." Melillo admitted that this was a management position. In the early summer of 1965 his leg healed to the point where he could resume driving. He asked Lizza to reinstate him as a driver. Lizza referred him to the Union. When Melillo made the request to the Union, he was told to apply in writing to the executive board. After a hearing held pursuant to his application, the executive board notified him on January 25, 1966, that he was being reinstated, and restored him to number 13 on the driver seniority list. Shortly thereafter a number of other Lizza drivers objected to the executive board's action and filed charges against Melillo for antiunion conduct. As a result, on February 15 the executive board notified Melillo that

he would have to appear again at a hearing. At that hearing, he was called upon to answer the charges that he had engaged in antiunion conduct and also that because he had been out of the unit he was not entitled to seniority. After the hearing the executive board, by letter dated March 29, 1966, withdrew Melillo's seniority, without specifying a reason for its action. The complaint alleged that by this action the Respondent violated Section 8(b)(1)(A) of the Act.

The Trial Examiner dismissed the complaint on two grounds. First, he looked to the collectivebargaining contract to ascertain what were Melillo's seniority rights under the contract after he left the unit. Since the contract was silent on the questions of an employee's retention or loss of seniority after he leaves the unit, the Trial Examiner concluded that such silence indicates that an employee who leaves the unit does not retain seniority. Reasoning that rights such as seniority are creatures of contract, and that where the contract is silent no right may be inferred, the Trial Examiner stated "if Melillo, in fact, left the contract unit, he abandoned his seniority rights." Having concluded that Melillo did leave the unit and thus abandoned his seniority rights, the Trial Examiner decided that the Union had an obligation to Melillo, "to treat [him] in the same way the Union treated others similarly situated." Since the parties had never faced a problem like this before, the Trial Examiner decided that the Union was free to act in the best interests of its members, and that it fulfilled its obligation to Melillo when it gave him a hearing.

After disposing of the case on this ground, the Trial Examiner nevertheless proceeded to assume arguendo that Melillo did have seniority rights, but concluded that the Union did not unlawfully deprive him of such rights. Since the objections to his restoration with seniority fell into two classes—the discriminatory objection that he was "antiunion" and the nondiscriminatory objection that he had left the bargaining unit— and since the Union's letter did not specify the reason for its withdrawal of seniority, the Trial Examiner concluded that, in any event, the General Counsel had not proven a case of unlawful motivation. The Trial Examiner found that the presentation to the executive board of these two motives did not indicate that the executive board's "motivating reason" was discriminatory. In the absence of further proof of discriminatory motive and considering the "presumption of union fair dealing," he determined that the General Counsel had not made out a prima facie case, stating that "all the evidence presents is a basis for suspicion. But suspicion is not proof sufficient for grounding an inference of unlawfulness."

We disagree. The issue in the case is not whether Melillo is entitled to seniority, but rather whether the Union revoked his seniority for a discriminatory reason. While it is true that the contract is silent on the subject of an employee's right to seniority after an absence from the unit, it is undisputed that the Union here has stepped into the contractual vacuum and has undertaken (at Lizza's request) the task of making all determinations relating to seniority. Thus the question of Melillo's right to restoration of seniority, a question which was decided by the Trial Examiner on the ground of contract interpretation, is not really dispositive of the issue. For the Union has undertaken to judge seniority, and, accordingly, we must look to the Union to see if that power was exercised lawfully.

The Trial Examiner gets to the key issue in the case in his discussion of his alternative disposition of the case. He rightly discusses the lawfulness or unlawfulness of the Union's motivation as forming the basis for decision. However, we disagree with his conclusion that the evidence establishes only a "suspicion" of discrimination which would not legally support an inference of discrimination. In our view the evidence compels the conclusion that Melillo's seniority was discriminatorily revoked in violation of Section 8(b)(2) and 8(b)(1)(A).

As Union President Geoghegan testified, after the executive board originally voted on September 16, 1965, to restore Melillo's seniority, an angry clamor arose from the drivers demanding revocation of the action because Melillo had acted in an antiunion fashion during the period he was out of the unit. The drivers were told to put their objections in writing, and Melillo was told to defend himself against these objections if he wished to retain his seniority.

There can be no doubt from a reading of the charges upon which Melillo was tried that they related principally to his alleged antiunion activities, such as threatening to import strikebreakers and discriminating against union drivers. When one driver attempted to bring up the fact that Melillo was not entitled to a restoration of his seniority because of his absence from the unit, the driver was ruled out of order by the executive board, thus indicating that this nondiscriminatory reason was not the issue on which the hearing was being held.

In sum, we predicate our reversal of the Trial Examiner's refusal to find discriminatory motivation on three facts:

- 1. The charges filed against Melillo related principally to his alleged antiunion acts.
- 2. Most of the testimony at the hearing in support of the charges related to these same acts, and testimony about his loss of seniority when he left the unit was excluded.
- 3. The executive board revoked its decision to restore Melillo to his old seniority only on the basis of the testimony of his antiunion activities.

We conclude, accordingly, that the evidence amply warrants us in making the inference that Melillo's seniority was revoked, primarily, for discriminatory reasons. We further find that such revocation resulted in a material reduction in the amount of work available to him and thereby was in violation of Section 8(b)(1)(A) and 8(b)(2) of the Act.

## THE REMEDY

Having found, contrary to the Trial Examiner, that the Respondent has engaged in unfair labor practices, we shall require it to cease and desist therefrom and from any like or related conduct, and take certain affirmative action designed to effectuate the policies of the Act.

We have found that the Respondent discriminatorily revoked the seniority of James L. Melillo on March 29, 1966. Accordingly, we shall order the Respondent to notify Lizza and Sons, Inc., and Melillo, that it withdraws its revocation of Melillo's seniority, and request Lizza and Sons to reinstate Melillo, and make Melillo whole for the loss of pay suffered by him by reason of the discrimination practiced against him by payment to him of a sum of money equal to the amount he normally would have earned as wages during the period from the date of the discrimination, less his net earnings during that period, computed on a quarterly basis, as provided by the Board in F.W. Woolworth Company, 90 NLRB 289, and interest at the rate of 6 percent per annum shall be added. See Isis Plumbing & Heating Co., 138 NLRB 716.

#### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its officers, agents, and representatives, shall:

- 1. Cease and desist from:
- (a) Causing or attempting to cause Lizza and Sons, Inc., to discriminate against James L. Melillo or any other employee in violation of Section 8(a)(3) of the Act.
- (b) In any like or related manner restraining or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.
- 2. Take the following affirmative action, which the Board finds will effectuate the purposes of the Act:
- (a) Withdraw the revocation of the seniority position to which it had restored James L. Melillo on January 25, 1966, and request Lizza and Sons, Inc., to reinstate Melillo, and so notify James L. Melillo and his Employer, Lizza and Sons, Inc.
  - (b) Make whole James L. Melillo for any loss of

pay suffered by reason of the discrimination against him in the manner set forth in the section of this Decision and Order entitled "The Remedy."

(c) Post at its offices copies of the attached notice marked "Appendix." Copies of said notice, to be furnished by the Regional Director for Region 29, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 29, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

## **APPENDIX**

#### NOTICE TO ALL MEMBERS

Pursuant to a Decision and Order of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT cause or attempt to cause Lizza and Sons, Inc., to discriminate with regard to seniority against any of its employees in violation of Section 8(a)(3) of the Act.

WE WILL NOT in any like or related manner restrain or coerce employees of Lizza and Sons, Inc., in the exercise of their right to self-organization, to form, join, or assist unions, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from such activities, except to the extent that such rights may be affected by an agreement requiring union membership as a condition of employment, as authorized by Section 8(a)(3) of the Act.

WE WILL withdraw our revocation of James L. Melillo's seniority and request Lizza and Sons, Inc., to reinstate James L. Melillo.

WE WILL make James L. Melillo whole for any loss of pay suffered by reason of the discrimination against him.

> LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA (Labor Organization)

Ву

Dated

(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 16 Court Street, Brooklyn, New York 11201, Telephone 596–3535.

#### TRIAL EXAMINER'S DECISION

#### STATEMENT OF THE CASE

Morton D. Friedman, Trial Examiner: Upon a charge filed on July 14, 1966, by James L. Melillo, the Regional Director for Region 29 of the National Labor Relations Board, herein called the Board, issued a complaint on September 30, 1966, on behalf of the General Counsel of the Board against Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union or the Respondent, alleging violations of Section 8(b)(1)(A) and (2) of the National Labor Relations Act, as amended (29 U.S.C. Sec. 151 et seq.), herein called the Act. In its duly filed answer to the aforesaid complaint, the Respondent, while admitting certain of the allegations thereof, denied the commission of any unfair labor practices.

Pursuant to notice, a hearing was held before me in Brooklyn, New York. All parties were represented and afforded full opportunity to be heard, to introduce relevant evidence, to present oral argument, and to file briefs. Briefs were filed by counsel for the General Counsel and by the Respondent. Upon consideration of the entire record in this case, including the briefs filed, and upon my observation of the demeanor of each of the witnesses testifying before me, I make the following:

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

#### I. THE BUSINESS OF THE EMPLOYER

Lizza and Sons, Inc., herein called Lizza or the Employer, is a New York corporation having its office and principal place of business in the city of Oyster Bay, New York, where it is engaged in performing general contracting services in the building and construction industry and related services. During the year immediately preceding the issuance of the complaint herein, a representative period, Lizza purchased and caused to be transported and delivered to its Oyster Bay, New York, place of business, building and other general contracting equipment, supplies, and other goods and materials of a value in excess of \$50,000, of which goods and materials valued in excess of \$50,000 were transported and delivered to its place of business in interstate commerce directly from States of the United States other then the State of New York.

It is admitted, and I find, that Lizza is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

### II. THE LABOR ORGANIZATION IVOLVED

It is admitted, and I find, that the Respondent is a labor organization within the meaning of Section 2(5) of the Act.

#### III. THE ALLEGED UNFAIR LABOR PRACTICES

#### A. The Issues

The complaint alleges, in substance, that James Melillo, an employee of Lizza, was deprived of and continues to be deprived of the seniority to which he is entitled as such employee by the Union and that the Union has caused Lizza to fail and refuse to employ Melillo. The complaint further alleges, and it was stipulated at the hearing, that Lizza and the Union have maintained in effect an agreement, understanding, and practice whereby the Union administers and determines the seniority of the employed by Lizza, said seniority determinations being subject to objections of Lizza. The complaint also alleges that the Union refused and deprived Melillo of his seniority because the Union believed that Melillo refused to support and assist the Union and that he engaged in antiunion activities. By these acts, according to the complaint, the Union restrained and coerced Lizza's employees in violation of Section 8(b)(1)(A) and by causing Lizza to discriminate against Melillo in violation of Section 8(a)(3) of the Act, the Union has engaged in violations of Section 8(b)(2) of the Act.

The Respondent Union in its answer generally denies any unlawful acts and contends that Melillo forfeited his seniority as a driver upon his voluntarily quitting his job as a driver several years before the events herein and that, therefore, the Union was under no obligation to restore such seniority to him. The Union further contended that even if its action had resulted in Melillo's loss of seniority this would not have constituted a violation of the Act because the reasons for denying Melillo his seniority were neither discriminatory nor otherwise unlawful. In support of its contentions, the Union argues that when Melillo quit his job as a driver several years prior to the events herein, he withdrew from the unit covered by the agreement between the Union and Lizza and thereby lost his seniority position and, furthermore, during this interim employment with Lizza, Melillo was a supervisor. Moreover, the agreement pursuant to which seniority was administered by the Union is completely silent as to retention of seniority upon leaving the unit and such silence determines that seniority is not retained after leaving the unit.

Thus the principal issues framed by the various pleadings and contentions are:

1. Did Melillo retain his seniority when he gave up driving and accepted other employment with Lizza?

2. If Melillo retained seniority, when the Union deprived him of this seniority did it do so discriminatorily?

#### B. The Facts

Melillo began working for Lizza in 1950 as a dispatcher in the asphalt plant. After approximately 1 year he became a driver and joined the Union. He has retained his union membership since then. Melillo worked as a driver from approximately February 1951 until August 1960 when he was forced, upon his doctor's advice, to give up driving because of an old injury to his left leg. Lizza then transferred Melillo to the position of runner which, according to Melillo, made him responsible for the sufficiency of material and trucks assigned to any job that

Lizza might have. Mehllo admitted that during the time he was a runner he was a "representative of management." However, he also denied that he ever dealt with the employment status of any of the drivers. On the other hand, he did admit that he secured the reinstatement of an employee named Oliver.

By about the early summer of 1965, Melillo's leg injury had healed to the point where his doctor informed him that he could go back to driving a truck if he so desired. Evidently disenchanted with his job as runner, Melillo, sometime in the summer of 1965, asked Al Lizza, president of Lizza, to go back to work as a driver. Lizza informed Melillo that he "had nothing to do with the drivers. That is a Union problem, I [sic] must take it up with the Union."

Thereafter Melillo called at the office of the Union and asked how he was to be reinstated as a chauffeur. He spoke to James Geoghegan, acting president, and John Cody, vice president, of the Union. The latter told Melillo to apply in writing to the executive board to request reinstatement as a driver. In accordance with these instructions, Melillo submitted a letter to the executive board requesting reinstatement to driver status with full seniority.<sup>2</sup>

On September 16, 1965, as a result of Melillo's written request, an executive board meeting was held. Present were Geoghegan, Cody, Benedict Ciavolella, secretary-treasurer of the Union, and three of the employees of Lizza who were members of the Union. The other Lizza employees opposed Melillo's reinstatement as a driver with full seniority because Melillo had been out of the unit for 5 years and had, according to them, engaged in antiunion acts and also because he had hired and fired employees which made him a supervisor. After this executive board hearing, Melillo was notified by letter dated January 25, 1966, that the executive board, by unanimous vote, had decided to restore him to his proper seniority status on the seniority list of the Lizza employees, such reinstatement to take effect on or before February 15, 1966.

Thereafter, on a date not ascertainable, Melillo did return to work as a driver for Lizza having the number 13 position on the seniority roster. This meant that as the drivers daily shaped up at the company barn Melillo was in very good position to work each day as a driver. However, about February 15, Union Vice President Cody called Melillo and told him that he no longer had seniority at Lizza. When he asked Cody the reason, Cody told Melillo that a letter would follow, that there were many objections to Melillo getting back his seniority and that, furthermore, Melillo would have to go before the executive board again. Approximately a week thereafter, by letter dated February 21, 1966, Melillo was informed by the Union that a hearing on charges against him would be held on Thursday, March 3, 1966, at the union hall. Attached to the letter were charges filed with the executive board by various Lizza driver-members.

These charges, similar to the allegations made at the original executive board meeting, detail the manner in which it was alleged that Melillo discriminated against union members in his capacity as a runner; how Melillo during a strike in 1959 and another one in 1961 called drivers at their homes and threatened them to take out the

<sup>&</sup>lt;sup>1</sup> Mehllo places this date as January 1966, but it is evident that as events unfolded the decision to go back as a driver occurred sometime in the spring or summer of 1965

<sup>&</sup>lt;sup>2</sup> This letter is dated July 7, 1965, which would indicate that Mehillo's decision to return as a driver occurred sometime in the early summer or late spring of 1965.

trucks or be fired and be replaced by strikebreakers. The charges also alleged that Melillo was a "management representative" and that he was authorized to hire and fire during the period in which he served Lizza as a runner. These charges were signed by some 26 to 28 of Lizza's employees, most of whom were below Melillo on the seniority list after Melillo's restoration to such list.

In connection with the filing of these charges and the second hearing, Geoghegan credibly testified that the charges were filed, and the second executive board meeting was brought about, because of many protests which were lodged forcefully with him at a regular union meeting held after it was decided in the first instance to restore Melillo's seniority. According to Geoghegan, he was overwhelmed by the number of Lizza's employees who protested the executive board's fixing of Lizza's seniority. Geoghegan explained that the executive board and Geoghegan, himself, had no alternative but to act upon the protest of the rank-and-file members of the Union who were truckdriver-employees of Lizza.

On March 3, 1966, the executive board meeting was held in the union hall. Present besides the executive board, which was chaired by Geoghegan, and Melillo, who was there to defend his position, were the employees who had signed the charges and others. The testimony given by the employees followed to a great extent the allegations set forth in the charges. In each instance Melillo was given an opportunity to defend his position and to counter the allegations made by the complaining members. It is unnecessary here to go into the details of these allegations but generally the testimony was to the effect that either (a) Melillo acted in antiunion fashion or (b) he had lost his seniority by reason of fact that he acted as a "management representative" who had the right to hire and fire.

By letter dated March 29, 1966, signed by the recording secretary of the Union, Melillo was informed that the executive board, after hearing all the parties and considering the entire record in the matter, determined that the position of the Union was that Melillo did not have seniority as a driver for Lizza. Since that date, Melillo has not worked as a driver for Lizza but has, since then, as noted above, become a foreman of construction.

The notice, above mentioned, was completely silent as to the reasons why the executive board changed its mind in Melillo's case. However, in testifying, Geoghegan emphasized the fact that Melillo had acted as a management agent and had occupied a position outside the unit. He stated that at the second hearing before the executive board the evidence was overwhelming. The record does not show any other detail as to the basis or the reason for the Union's executive board decision.

During all of the foregoing events, there existed a contractual relationship between Lizza and the Union which was detailed in two separate bargaining agreements, one known as the "Excavating Contract" and the other known as the "Ready-Mix Concrete. Sand, Gravel and Asphalt Contract." So far as seniority provisions in the said agreements are concerned, the excavating contract merely states that "seniority shall prevail." It also states, in another section, that leaves of absence may be granted not to exceed 6 months for health or layoffs. The Ready-Mix Concrete contract states that barn seniority with a master list shall apply. It also states that this seniority

shall govern daily work assignments. This contract does not specify the exact leave of absence or sick leave which may be granted under a contract but merely states that leaves of absence without pay may be granted by the Employer during the period from December 15 to March 15 of any year.

Thus it is apparent that from neither of the contracts can it be said that seniority is either retained or lost upon transfer out of the unit to another position with the Employer. Manifestly, the agreements are silent on this point.

#### C. Discussion and Concluding Findings

Both the General Counsel and the Union view as highly significant the fact that the agreements affecting the relationship between the Union and Lizza are silent regarding the retention or loss of seniority upon an employee's ceasing to be a driver. In the General Counsel's view, this silence endows the employee who leaves the unit with seniority retention. The Union contends that the failure of the agreements to mention the subject leaves the employee who gives up driving with no seniority rights. I find merit in the Union's contention.

Neither the General Counsel nor the Union cite direct precedent for their opposing contentions. Indeed, research has failed to uncover such precedent. The cases each cite treat of the subject in a peripheral manner. But, it would seem that as a matter of good practice in labor management relationships, rights which are not bestowed by the Act or other statute must be created by contract and where the contract is silent, no rights are created. This would seem to be the practice generally, since cases dealing with retention of seniority upon leaving the unit uniformly discuss the retention rights as created by the agreement between management and union. Thus, even in the Ward Baking Company case cited by the General Counsel,3 the agreement between the employer and the union set forth ways in which seniority could be lost, thus, by inference, agreeing that in all other instances seniority was to be retained. But, this was an inference created by contract.

No such inference can be raised from the contracts involved in the instant case. Their silence raises none. Therefore, if Melillo, in fact, left the contract unit, he abandoned his seniority rights.

The contract unit under both agreements involved here includes drivers. The asphalt contract unit includes only drivers or chauffeurs; the excavating contract covers chauffeurs, euclid, and turnapull operators. When, in 1960, Melillo gave up his position as driver or chauffeur to become a runner, he left the units covered by both agreements since neither unit included the classification of runner or dispatcher. This is so even accepting Melillo's testimony that he was forced to give up driving for health reasons. Therefore, it is not necessary to determine whether Melillo did become a member of management or a supervisor. When he gave up his unit position he surrendered his seniority rights and I so find.

What then, were the Union's obligations to Melillo when he made application for reinstatement as a chauffeur with full seniority rights? Obviously, as discussed above, there was no obligation under the agreements to restore

<sup>&</sup>lt;sup>3</sup> Local 50, American Bakery & Confectionery Workers Union, AFL-CIO (Ward Baking Company), 143 NLRB 233

<sup>&</sup>lt;sup>4</sup> A runner is a type of dispatcher

<sup>&</sup>lt;sup>5</sup> Melillo's accusers before the executive board stated that Melillo gave up driving to become a runner because the latter position was steady whereas drivers did not work in bad weather.

Melillo's seniority. Thus, the only obligation on the part of the Union was to treat Melillo in the same way the Union treated others similarly situated. But, the record is devoid of any evidence that a like situation had ever arisen before. Therefore, so far as the Union was concerned there was no precedent and it was free to act in the best interest of all of its members who were employees of Lizza. To place Melillo back in his former position on the seniority list to the detriment of many of the Lizza driver-members was not in the best interest of the membership as a whole. Accordingly, when an overwhelming number of Lizza drivers voiced their objections, and a hearing was given Melillo, the Union fulfilled its obligation to him.

Accordingly, I find and conclude that the General Counsel has failed to prove that the Union has deprived Melillo of the seniority rights to which he was entitled because he was entitled to none. Therefore, I find merit in the Union's motion to dismiss on the basis that the General Counsel has failed to make out a prima facie case.

But, even assuming that Melillo did have seniority rights, as claimed by the General Counsel, I would still come to a like conclusion. As recounted heretofore, the basic objections to Melillo's application for restoration of seniority rights fell into two classes. The first was that Melillo, as a runner, had acted in an antiunion fashion, had discriminated against members of the Union, and had participated in strikebreaking. The second class of objections were concerned with the fact that Melillo had left the bargaining unit and had become a supervisor, thereby abandoning his seniority rights. Also as noted above, the letter informing Melillo that he had no seniority as a Lizza driver failed to recite any reason why the executive board had made this decision. Other than the foregoing, the record is devoid of any evidence which would sustain the General Counsel's contention that the basis for the refusal to grant to Melillo his claimed seniority rights was at least, in part, because Melillo had engaged in antiunion activity and that the decision was, therefore, discriminatory.

The General Counsel contends, however, that from this evidence as set forth it should be inferred that at least part of the Union's reasons for its activity was motivated by Melillo's alleged antiunion actions. This, claims the General Counsel, is sufficient to establish his case. I do not agree. In order to reach the conclusion desired by the General Counsel it would be necessary to infer solely from the charges filed by the union members against Melillo that the Union acted in a discriminatory fashion, and that

the motivating reason for depriving Melillo of seniority rights was that the union members present at the hearing had complained that Melillo was "anti-union." However, I do not find that it follows that merely because some of the objections to Melillo were based on the members' belief Melillo was antiunion, the executive board's decision was motivated even in part by such consideration. In the absence of any further evidence of the reasons for the executive board's actions, I conclude that all the evidence presents is a basis for suspicion. But suspicion is not proof sufficient for grounding an inference of unlawfulness.

In coming to this conclusion I note the court of appeals language in the case of Stewart v. Day & Zimmerman,

Inc.,6 in which the court states:

... that union officials should be given a wide latitude in deciding intra-union disputes and that courts should be slow to intervene in them, but should, on the other hand, invest their decisions with a presumption of honesty and fairness.

The action of the Union herein, and of its executive board, was taken with regard to an intraunion dispute. We should therefore be slow to intervene and should invest their decision with a presumption of honesty and fairness. This being so, it would require more evidence than the record now offers to overcome this presumption of honesty and fairness. This the General Counsel has failed to do. For this reason, alone, I would grant the Respondent's motion to dismiss.

# CONCLUSIONS OF LAW

- 1. Lizza and Sons, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
- 2. Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.
- 3. The Respondent Union has not deprived James L. Melillo of the seniority to which he was entitled as an employee of Lizza and has not caused Lizza to discriminatorily fail and refuse to employ Melillo.

4. The Respondent Union has not violated Section

8(b)(1)(A) and (2) of the Act.

#### RECOMMENDED ORDER

It is hereby recommended that the complaint in this proceeding should be, and it hereby is, dismissed.

<sup>6 294</sup> F 2d 7, 11 (C A 5)